

Document:-
A/CN.4/3074

Summary record of the 3074th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

He also had some concerns about the last sentence, in particular the reference to the exceptions cited in guideline 4.2.5 (Non-reciprocal application of obligations to which a reservation relates), which he would address in connection with that guideline.

Paragraph (24), as amended, was adopted.

Paragraph (25)

Paragraph (25) was adopted.

Paragraph (26)

85. Mr. NOLTE wondered whether the principle of reciprocity was correctly described in the paragraph, which spoke of the right to require the fulfilment of an obligation. A similar statement about the loss of the right to invoke an obligation appeared in the third sentence of paragraph (7) of the commentary to draft guideline 4.2.5. There, in a context of human rights treaties, which dealt with obligations for the benefit of the individual, the concept of invocation of an obligation was appropriate, but in the context of guideline 4.2.4, where inter-State relations were concerned, the parties were released from the obligation itself. He therefore proposed that paragraph (26) be redrafted as follows:

“It follows that the author of the reservation is not only released from compliance with the treaty obligations which are the subject of the reservation, but also that the State or international organization with regard to which the reservation is established is released from the obligation to which the reservation relates with regard to the author of the reservation.”

86. Mr. GAJA said that, although he shared Mr. Nolte’s concerns, he was not entirely satisfied with the wording of his proposal. The Commission needed more time to consider how to explain in the commentaries the distinction between guidelines 4.2.4 and 4.2.5, in other words, the fact that, in certain cases, the content of the obligation changed and the State or international organization was released from the obligation, whereas, in other cases (guideline 4.2.5), the obligation still existed, but only towards States other than the author of the reservation. That distinction seemed fairly clear in the guidelines, less so in the commentary.

87. The CHAIRPERSON said that the Commission would continue its consideration of paragraph (26) at the next plenary meeting.

The meeting rose at 1 p.m.

3074th MEETING

Tuesday, 3 August 2010, at 3.05 p.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki,

Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-second session (*continued*)

CHAPTER IV. *Reservations to treaties (continued)* (A/CN.4/L.764 and Add.1–10)

C. *Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (continued)* (A/CN.4/L.764/Add.2–10)

2. *TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SECOND SESSION (continued)* (A/CN.4/L.764/Add.3–10)

1. The CHAIRPERSON invited the members of the Commission to continue with the adoption of section C.2 of chapter IV by considering document A/CN.4/L.764/Add.6 paragraph by paragraph.

Commentary to guideline 4.2.4 (Effect of an established reservation on treaty relations) (*concluded*)

Paragraph (26)

2. Mr. NOLTE said that paragraph (26) defined in general terms the principle of reciprocal application, which meant that one party was released from compliance with a treaty obligation and another party could not invoke that obligation. Paragraph (7) of the commentary to 4.2.5 specified that a State or international organization that had made a reservation could not invoke the obligation excluded or modified by that reservation. He proposed to simplify paragraph (26) by not raising the issue of invocation and merely to refer to the reciprocal application of the obligation. The text would then read:

“It follows that not only the author of the reservation is released from compliance with the treaty obligations which are the subject of the reservation, but that the same is true for the State or international organization with regard to which the reservation is established.”

3. Mr. PELLET (Special Rapporteur) said that the point made by Mr. Nolte was correct, but insofar as a non-reciprocal obligation was concerned, the reserving State also lost the right to require other States to apply it. He did not see how paragraph (7) of the commentary to draft guideline 4.2.5 supported Mr. Nolte’s position.

4. Mr. GAJA said that he had no objection to the initial text of paragraph (26), but had a problem with Mr. Nolte’s proposal: the State or international organization with regard to which the reservation was established was released from its treaty obligations towards the reserving State, but there might be a parallel obligation towards other States or international organizations. That aspect should be included.

5. Sir Michael WOOD proposed to retain the current text of paragraph (26) and to add the following sentence to take Mr. Nolte’s concern into account:

“In addition, the State or international organization with regard to which the reservation is established is released from compliance with the obligation which is the subject of the reservation with respect to the reserving State.”

Paragraph (26), as amended, was adopted.

Paragraph (27)

6. Mr. VÁZQUEZ-BERMÚDEZ said that the words “principle of reciprocity” in the first sentence should be replaced by the words which the Drafting Committee had used elsewhere in that part of the commentary, namely “principle of reciprocal application”.

Paragraph (27), as amended, was adopted.

Paragraphs (28) to (34)

Paragraphs (28) to (34) were adopted.

The commentary to draft guideline 4.2.4, as amended, was adopted.

Commentary to guideline 4.2.5 (Non-reciprocal application of obligations to which a reservation relates)

Paragraph (1)

7. Mr. VÁZQUEZ-BERMÚDEZ said that the words “principle of reciprocity” should be replaced by “principle of reciprocal application” for the same reasons as in paragraph (27) of the commentary to draft guideline 4.2.4.

Paragraph (1), as amended, was adopted.

Paragraph (2)

8. Mr. GAJA said that the first sentence of the paragraph was confusing, because the general rule enunciated in the Vienna Conventions, which was at issue, did not provide for any exceptions: the situation which prevailed between the reserving State and the State which had accepted the reservation did not presuppose any change in the content of the obligations that the latter might have towards other entities. His suggestion was to delete the first sentence.

9. Mr. PELLET (Special Rapporteur) said that he was opposed to that suggestion, but agreed not to speak of exceptions and proposed the following wording: “... guideline 4.2.5 emphasizes that the principle of reciprocity is not absolute” [... *la directive 4.2.5 souligne que le principe de réciprocité n'est pas absolu*].

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

10. Mr. GAJA proposed the insertion of the word “only” after “apply not” in the fourth line. That did not seem to be controversial.

11. Mr. PELLET (Special Rapporteur) said that, on the contrary, that was the heart of the problem, because paragraph (4) concerned non-reciprocal obligations. The text could specify that the measure of reciprocity accompanying those obligations was not affected by draft guideline 4.2.5, but it certainly could not mix up reciprocal and non-reciprocal obligations. If the word “only” was inserted, it would mean that draft guideline 4.2.5 might be applicable to non-reciprocal obligations, which was simply impossible.

12. Mr. GAJA said that human rights treaties imposed obligations on States with regard not only to individuals but also to other States parties. The non-reciprocal element of some obligations did not mean that treaties did not impose obligations on a State party towards another State party.

13. Mr. PELLET (Special Rapporteur) said that the problem was that Mr. Gaja was talking about treaties, whereas he himself was speaking of an obligation towards others. That obligation was always either reciprocal or non-reciprocal. In the current case, obligations were at issue which were not reciprocal *vis-à-vis* certain entities. Consequently, *insofar* as they were not reciprocal (as indicated by the first words of draft guideline 4.2.5), they could not be considered to be reciprocal in part, which Mr. Gaja was saying with his proposal.

14. Mr. GAJA said that although those obligations did not apply between the reserving State and the State which had accepted the reservation, they did apply in relation to other States parties and thus they still existed.

15. Mr. PELLET (Special Rapporteur) proposed to move paragraph (7), which dealt with that point, and to insert it as a new paragraph (4) *bis* after paragraph (4), which could be amended to read:

“(4) A typical example is afforded by the human rights treaties. The fact that a State formulates a reservation excluding the application of one of the obligations contained in such a treaty does not release a State which accepts the reservation from respecting that obligation, insofar as the obligation concerned is non-reciprocal. Also insofar as it is non-reciprocal, that obligation applies not in an inter-State relationship between the reserving State and the State which has accepted the reservation, but simply in a State-human being relationship. The Human Rights Committee ... within their jurisdiction.

“(4) *bis* Qualifying that absolute formulation, the phrase ‘insofar as’, with which guideline 4.2.5 begins, aims to show that even if the nature of the obligation or the object and purpose of the treaty as a whole exclude the reciprocity of reservations, elements of reciprocity may nevertheless remain in the relations between the author of the reservation and the other parties to the treaty. Thus, for example, ... at the end of the first sentence of guideline 4.2.5.”

[(4) *Un exemple typique est constitué par les conventions relatives à la protection des droits de l'homme*¹. Le fait qu'un État formule une réserve

excluant l'application d'une des obligations contenues dans une telle convention ne libère pas l'État l'acceptant de respecter cette obligation, dans la mesure où il s'agit d'une obligation non réciproque. Toujours dans cette mesure, une telle obligation n'est en effet pas appliquée dans la relation interétatique entre l'État réservataire et l'État qui a accepté la réserve, mais simplement dans une relation État-être humain, où il s'agit d'obligations non réciproques. Le Comité des droits de l'homme [...] de la juridiction des États^[...].

(4) bis *Nuançant cette formulation absolue, l'expression '[d]ans la mesure où' qui introduit la directive 4.2.5 tend à montrer que même si la nature de l'obligation ou l'objet et le but du traité dans son ensemble excluent le jeu réciproque des réserves, des éléments de réciprocité peuvent néanmoins subsister dans les relations entre l'auteur de la réserve et les autres parties au traité. Ainsi par exemple, [...] à la fin de la première phrase de la directive 4.2.5.]*

16. Mr. GAJA said that the new paragraph (4) *bis* addressed non-reciprocal elements of a treaty. In the area of non-reciprocal elements, obligations existed between States that had not made a reservation but had accepted the reservation and other States parties to the treaty. The third sentence of paragraph (4) seemed to be saying that when the obligation was not reciprocal, it only existed in a State–human being relationship; that posed a problem.

17. Sir Michael WOOD said that it would suffice to delete the word “simply” in the third sentence of paragraph (4).

18. The CHAIRPERSON said he took it that the Commission wished to approve the proposals by Mr. Pellet (Special Rapporteur) and Sir Michael.

It was so decided.

Paragraph (4), as amended, and paragraph (4) bis were adopted.

Paragraph (5)

19. Mr. PELLET (Special Rapporteur), referring to the French version, proposed the insertion of the words “*Au demeurant*” at the beginning of paragraph (5) in order to have a smoother transition from paragraph (4) *bis*.

Paragraph (5), as amended, was adopted.

Paragraph (6)

20. Mr. GAJA proposed that the wording of the second sentence should be amended to read: “A party owes an obligation towards all the other parties to the treaty.”

Paragraph (6), as amended, was adopted.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were adopted.

Paragraph (11)

21. Mr. McRAE said that the word “magical” should be replaced by “cultural”.

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

The commentary to guideline 4.2.5 as a whole, as amended, was adopted.

Programme, procedures and working methods of the Commission and its documentation (concluded)* (A/CN.4/620 and Add.1, sect. I, A/CN.4/L.775)

[Agenda item 11]

REPORT OF THE PLANNING GROUP

22. The CHAIRPERSON drew attention to the information distributed on the publications and websites of the Codification Division (document without a symbol, distributed at the meeting).

23. Mr. MIKULKA (Secretary to the Commission) said that during the meeting of the Planning Group, information had been requested on the status of the trust fund on the backlog relating to the publication of the *Yearbook of the International Law Commission*. The balance of the fund currently stood at \$23,720. Over the past year, Panama had contributed \$500, Ireland \$1,984 and Chile \$5,000 to the fund.

24. Mr. DUGARD (Chairperson of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.775), said that the Group had held five meetings and had had before it section J of the topical summary of the discussions held in the Sixth Committee of the General Assembly at its sixty-fourth session entitled “Other decisions and conclusions of the Commission” (A/CN.4/620 and Add.1); the proposed strategic framework for the period 2012–2013,³⁷⁹ covering “Programme 6: Legal affairs”; General Assembly resolution 64/114 of 16 December 2009 on the report of the International Law Commission on the work of its sixty-first session, in particular paragraphs 7, 8 and 13 to 21; General Assembly resolution 64/116 of 16 December 2009 on the rule of law at the national and international levels; and chapter XIII, section A.3, of the report of the Commission at its sixty-first session concerning the consideration of General Assembly resolution 63/128 of 11 December 2008 on the rule of law at the national and international levels.³⁸⁰

25. The report was organized to reflect the outcome of discussions on the items that had been before the Planning Group. The Group had decided to prepare a detailed section on the rule of law in response to General Assembly resolution 64/116. It had also had a discussion on the

* Resumed from the 3053rd meeting.

³⁷⁹ A/65/6 (Prog. 6).

³⁸⁰ *Yearbook ... 2009*, vol. II (Part Two), p. 150, para. 231.

methods of work of the Commission, notably the work of the special rapporteurs, on the basis of a memorandum which he had prepared. Following discussion, the text had been revised. The revised text of the memorandum concerning the work of the special rapporteurs would be transmitted to the Working Group in 2011. The minutes of the debate had been circulated and sent to all members of the Commission.

26. The Planning Group had also addressed issues relating to its working methods and had agreed that, in order to better organize plenary debates and make full use of available resources, the members of the Commission should speak on the topic as early as possible after the introduction by the Special Rapporteur of the relevant report. The Planning Group had noted that it would be only in exceptional circumstances and for valid reasons that the plenary should only take note of draft articles adopted by the Drafting Committee during a given session and that every effort should be made to ensure that such draft articles were adopted and included in the report of the Commission, together with the commentaries prepared by the Special Rapporteurs. The Planning Group also recommended that when the Commission took note of draft articles, they should appear in a footnote in the Commission's report.

27. It was his understanding that the other recommendations of the Planning Group, if approved by the Commission, as was customary, would be incorporated into the report of the Commission under the chapter entitled "Other decisions and conclusions of the Commission", with the necessary adjustments.

28. Mr. PELLET said that, with regard to taking note of the draft articles adopted by the Drafting Committee, he was not radically opposed to the Commission's reproducing them in its report, but expressed a word of caution in that regard: there had been only one precedent, that of the draft articles on responsibility of States, which the Drafting Committee had adopted in 2000 and which the Commission had been so imprudent as to reproduce in its report. The result had been disastrous, because States had thought that they were expected to comment on the draft articles without really knowing, in the absence of commentary, what had motivated them.

29. Concerning the draft guidelines on reservations to treaties, he would like the Commission to discuss the future of the draft Guide to Practice, a first version of which had a good chance of being adopted by the end of the current session. Regardless of its fate, the Guide would need to be reviewed in its entirety by the Commission at the 2011 session. To that end, the Commission might envisage setting up a working group to meet for a week to put the final touches on all the commentaries to the draft guidelines, an enormous and rather technical task, since the Guide to Practice would be approximately 800 pages long.

30. Finally, he recalled that the Chairperson of the Human Rights Committee had written a letter to the Chairperson of the Commission. It would be useful for the Commission to have a brief exchange of views on how to reply.

31. The CHAIRPERSON said that the Enlarged Bureau would meet to discuss the three questions raised by Mr. Pellet. He took it that the Commission wished to adopt the report of the Planning Group (A/CN.4/L.775).

The report of the Planning Group was adopted.

The meeting rose at 4.30 p.m.

3075th MEETING

Wednesday, 4 August 2010, at 10.10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-second session (*continued*)

CHAPTER XIII. Other decisions and conclusions of the Commission (A/CN.4/L.773 and Add.1)

1. The CHAIRPERSON invited the Commission to begin its consideration of chapter XIII of the report with sections C, D and E of that chapter contained in document A/CN.4/L.773/Add.1 and to adopt them paragraph by paragraph.

C. Cooperation with other bodies

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Section C was adopted.

D. Representation at the sixty-fifth session of the General Assembly

Paragraph 6

Paragraph 6 was adopted.

Paragraph 7

2. Mr. GAJA proposed that the Commission should decide at the current plenary meeting which special rapporteur it would request to attend the sixty-fifth session of the General Assembly, under the terms of paragraph 5 of General Assembly resolution 44/35 of 4 December 1989.

3. The CHAIRPERSON said that the Bureau had discussed the matter and had agreed to recommend that Mr. Pellet, Special Rapporteur for the topic "Reservations to treaties", should be requested to attend the forthcoming session of the General Assembly.